

First of all this Bill of Sale was a security bill as is provided for in our Enactment and was read and explained fully to the defendant who signed and executed this Bill of Sale.

Section 9 (ii) of the Enactment says—

“The execution by the grantor of every bill of sale shall be attested—

- (a) by an advocate and solicitor of the Supreme Court not being the advocate and solicitor of the grantee; or
- (b) by a Magistrate or by a Registrar or Assistant Registrar of the Supreme Court;

who shall personally explain to the grantor the effect thereof, and the attestation shall state that before the execution of the bill of sale the effect thereof was so explained as aforesaid.”

I have no doubt that the Bill of Sale was personally explained to the grantor, and the learned Magistrate before whom the Bill of Sale was executed happens to be the Magistrate who heard this suit also, and he is perfectly certain that this was done. But the grantor comes along and he alleges that that is entirely wrong, and that the consideration was not truly set forth. Of course it is open to him to prove that it is so in such a case as this; but first of all I think the Magistrate would have been very careful before accepting a mere allegation of this kind in a matter like this.

The evidence produced before the Magistrate supporting that allegation of the defendant's consists of the evidence of the defendant-appellant himself and of two witnesses who say they were present when this Bill of Sale was executed and the transaction carried out, not before the Magistrate, but by a petition writer. That is the evidence in support of his contention.

I will not spend more time in going through that. The Magistrate says that he does not believe the witnesses, and I see nothing there which would justify me in reversing the decision of the learned Magistrate on this issue before him. Consequently, in my opinion, the appeal also fails on that ground, and I dismiss the appeal with costs.

Appeal dismissed.

[APPELLATE CIVIL JURISDICTION]

THOMAS, C. J., WHITLEY, J. &

HOWES, J.

June 15, 1935.

G. L. O'HARA HICKSON...Petitioner-Appellant
v.

J. O'HARA HICKSON.....Respondent
L. LEVINSONAS.....Co-respondent

[SELANGOR CIVIL APPEAL No. 14 of 1934]

*The Divorce Enactment, 1928—Domicile—
Intention to acquire domicile of choice—Evidence—
Declaration of intention.*

The petitioner-appellant, a rubber planter in Selangor, was born in Ireland in 1887 and his domicile of origin was the Irish Free State. He went abroad in 1906, returned to Ireland for four months in 1913, again for five weeks in 1919 and since then had never been back to Ireland.

He gave evidence that his intentions were to spend the rest of his life as a planter in Selangor and on retirement, although he had made no plans as to that, to settle in this country. This evidence was not controverted by the respondent or co-respondent, neither of whom appeared at the hearing of the petition.

In the Court below the Judge accepted the evidence of the petitioner-appellant but did not consider that such evidence established the acquisition of a domicile of choice in Selangor.

Held, that cases of domicile must be decided with regard to their own special facts.

Held further, that since there was no act done or other evidence given by the petitioner-appellant which conflicted with his evidence of intention, and such evidence, which was believed by the trial Judge, not having been controverted by the respondent or co-respondent, it was sufficient to establish a domicile of choice in Selangor.

Decision of Burton J. in *Hickson v. Hickson*, (1933-1934) F.M.S.L.R. 318; 4 Mal.L.J. 13. reversed

The Hon. Mr. E. D. Shearn for the petitioner-appellant: It was clear that the appellant had abandoned all thought of returning to his domicile of origin. The judgment of Lord Lindley in *Winans v. Attorney-General*, (1904) A.C. 287 was therefore in point. It was possible for appellant to acquire a domicile of choice during his residence in the State of Selangor—See *Haldane v. Eckford*, L.R. 8 Eq. 631. The real point is what is appellant's present intention. See *Bell v. Kennedy*, L.R. 1 Sc. & Div. 307. The Judge in the Court below accepted the appellant's evidence. He should have found that it was immaterial to consider that the appellant might subsequently change his present intention. See *Boldrini v. Boldrini*, (1932) P. 9 and *Udny v. Udny*, L.R. 1 Sc. & Div. 441. *Attorney-General v. Yule*, 145 L.T. 9 was distinguishable on the facts. *Waddington v. Waddington*, 36 T.L.R. 359 showed the type of proof of change of domicile. *Bryce v. Bryce*, (1933) P. 83 and *Hodgson v. De Beauchesne*, 12 Moo. P.C.C. 285 which were referred to in the judgment in the Court below related to declarations of persons not before the Court and had no relevance to statements on oath in the face of the Court.

Respondent absent.

Co-respondent absent.

Cur. Ad. Vult.

THOMAS, C.J.—This is an appeal by George Lionel O'Hara Hickson the petitioner in a divorce petition which was dismissed on the ground that the petitioner had not established a domicile choice.

In the evidence the petitioner stated that he had left Ireland, where he had been born in 1887, and where his father was domiciled, in 1906 when he went to take up tea planting in Assam.

In 1911 he left Assam, and came to this country where he opened up the Bhutan Estate, built all the buildings on the estate including the Manager's house, and eventually became the Manager of the Estate. From 1911 until the present day he has resided on the estate save when he obtained periods of leave. During his leave in 1913 and 1919 he visited Ireland where his parents still resided. On the latter visit he only spent four or five weeks in Ireland. He found things extremely bad there under the Sinn Fien troubles, and considered it impossible to continue living there. His brother who lived at Fermoy had been turned out by the Sinn Fien. At that time the appellant says that he definitely decided that it was his last visit to Ireland. His father died in 1920 and he, the petitioner, quarrelled with his mother on account of his marriage.

This took place in Singapore in 1922. A son was born in 1923. In 1924 he went on leave and lived near Maidstone in Kent. In 1928 he again went on leave and stayed in Guernsey. And in 1932 he again went on leave and stayed in Guernsey.

It will thus be seen that the petitioner has not returned to Ireland since 1919, and according to his own statement even prior to his marriage he had formed the intention of not returning to Ireland.

By 1926 his wife had taken to drink to excess and in consequence the appellant had been put to great expense which crippled him financially and caused him to borrow sums from the Bhutan Estate which he is repaying by instalments. It does not appear that the appellant is possessed of any private means whatever. It would seem that he is entirely dependent on his earnings as Manager of the Bhutan Estate.

In 1934 the appellant petitioned for a divorce from his wife naming one Levas Levinsonas as co-respondent. In that petition it was stated that the domicile of the appellant and his wife was within the State of Selangor.

Neither the wife nor the co-respondent entered an appearance or attempted to defend. In his evidence the appellant whilst giving the facts which have been already set out, made the following statement:—

“When I have to retire, I propose to settle in this country, but I have made no plans about that. That is my fixed intention.”

None of these statements have been controverted by the respondent or co-respondent.

The learned Judge who heard the petition said that he thought that the appellant was a candid witness and he was prepared to accept what he said. He did not, however, consider that the statement of facts made by the appel-

lant was sufficient to prove that he had acquired a domicile of choice in Selangor.

Statements of intention may be received even from living persons and may be weighed with the other evidence [*Crookenden v. Fuller*, (1895) 1 Sw. & Tr. 441; 164 E.R. 804]. The weight to be given to them may depend upon the degree of credit given to the person making them (*Udny v. Udny*, L.R. 1 Sc. & Div. 441).

When such statements are controverted and are encountered by conflicting declarations, they may be rejected [see *Bryce v. Bryce*, (1933) P. 83]; and so also when made in such an important document as a will, provided that the statement is not borne out by other actions (see *Attorney General v. Yule*, 145 L.T. 9). But when the statement is made by a living person, and is supported by some definite action, it may be upheld, even though controverted [see *Boldrini v. Boldrini*, (1932) P. 9].

In that case Lord Hanworth, M. R. said:—

“The learned President in his judgment not only shows that he is fully aware of all these principles but he says ‘If the matter had arisen two years ago, I think it would have been difficult to say that there was proof which could satisfy the Court of a fixed and settled intention of the petitioner to make his permanent home here.’ He is there referring to the fact that until 1929 there had not been any overt act such as there had been in that year by reason of the petitioner taking a lease of his house and paying down £405 by way of premium out of his savings.”

In other words, the Court seeks to be satisfied as to the truth of the statement as to the domicile. There is of course a temptation for a petitioner who desires to obtain a divorce to say that he has changed his domicile [see *David v. David*, Selangor Divorce No. 3 of 1933 (unreported)]; and any such statement must be looked upon with grave suspicion.

In the case of *Sugden v. St Leonards*, (1876) 1 P.D. 154, it was held that the contents of a lost will might be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached. And it seems so also on a question of domicile the question is not that there must be corroboration but what weight should be given to the statement.

In the present case the learned Judge was prepared to accept what the appellant said. His statements were not controverted by the respondent or co-respondent. There was no act or other statement done or made by the appellant which conflicted with his statement.

The appellant, it is true, is bound to this State by his employment, and also by his finan-

cial difficulties. These, however, do not conflict with his statement as to his intention. They might possibly indicate that he is compelled to remain and that his stay is not voluntary. But against this is his statement that in 1919 he had definitely decided not to return to Ireland and his statement that he intends to remain in the State of Selangor.

The learned Judge in his able and well considered judgment has, in my opinion, allowed his mind to be affected by a matter which I would with all respect suggest was not enquired into. The learned Judge goes on to say:—

“The Tropics are admittedly unsuitable for a European who has passed the prime of life and the adoption of a local domicile by a European is of the rarest occurrence.”

Yet it is common knowledge that there are many Europeans who have continued to reside in this country after that period has been reached. The learned Judge goes on to say:—

“Now I have no doubt that the petitioner is perfectly sincere in his declaration that he intends to stay on Bhutan Estate as long as possible. But I do not think that this is strong evidence of his intention to choose domicile in Selangor because the residence there is dictated by the necessity of earning his living, and, and as he admits himself, it must come to an end.....But anyhow I do not think the intention is sufficiently definite. He must show an *animus manendi* in Selangor, and I cannot deduce from his words an intention of settling in Selangor to the exclusion of the rest of Malaya. There may be suitable places in Selangor for the inhabitant of a temperate climate to spend his declining years, but of the places where we might expect a European to take up a permanent abode Fraser's Hill is very largely and Cameron's Highlands wholly in Pahang. It seems to me that there cannot be inferred from his words more than a vague intention to settle somewhere in Malaya or at the highest somewhere in the Federated Malay States. But even that is not enough.”

With all respect I would suggest that when the appellant used the words settle in this country, he meant Selangor, the State which has so kindly treated him for so many years when he has been compelled to say that he would never go back to Ireland. It may not be impossible that he considers the Bhutan Estate as “*illa angula terrae ridet*.” It is not possible that he may find delight on the sands of Morib, enjoyment in the reaches of Port Swettenham, attraction in the town of Kuala Lumpur and Klang, scenery and colder air in those parts of

the heights of Bukit Fraser within the State of Selangor. He might possibly also find residence in the State to be a convenient centre from which to visit temporarily the neighbouring States, Colonies and countries, the attractions of which are largely advertised.

Lord Hanworth, M.R. cites with approval the statement of Sir John Nicholl [see *Boldrini v. Boldrini* (*supra*) page 13]:—

“As a criterion, therefore, to ascertain domicile another principle is laid down by the authorities quoted as well as by practice—it depends upon the intention, upon the *quo animo*—that is the true basis and foundation of domicile; it must be a residence *sine animo revertendi*, in order to change the *domicilium originis*; a temporary residence for the purposes of health, or travel, or business has not the effect; it must be a fixed and permanent residence, abandoning finally and for ever the domicile of origin; yet liable still to a subsequent change of intention.”

I conclude that the statement of the appellant has been accepted by the learned Judge; it has not been controverted by either of the interested parties; it is borne out by his action in that he has never returned to Ireland, the intention made not recently but many years ago is borne out as far as it is possible for him to bear it out by his continued residence; no statement or declaration of any contrary intention has been advanced. It is true that he has made no investment, but this may well be due to the fact that he has no money to invest.

He can only state his intention. It may not be impossible that circumstances may arise which may compel him to depart from that intention. Such it is impossible for him to say and according to the dictum just cited, it is un- that he has no money to invest.

All cases of domicile must be decided with regard to their own special facts, and in view of all the evidence given in this case and for the reasons which have been set out above, with the greatest respect to the opinion of the learned trial Judge, I come to the conclusion that a domicile of choice has been sufficiently proved.

The appeal is accordingly allowed. The petition will be sent back for hearing on the other parts of the case.

WHITLEY, J.—This undefended petition for divorce was dismissed by Burton, J. on the ground that the petitioner had failed to establish that he had acquired a domicile in the State of Selangor.

In his petition the petitioner states that he is domiciled in Selangor and that statement is not challenged by the respondent or co-respon-

dent, who have entered no appearance. The only evidence adduced was that of the petitioner. The learned trial Judge believed that evidence and, accordingly, the only question which we have to decide is whether he was right in holding that the facts disclosed in that evidence were in law not sufficient to enable the petitioner to discharge the onus which rests upon him to satisfy the Court that he has acquired a new domicile in Selangor. He was apparently satisfied, and I think rightly so, that the domicile of origin in Ireland has been abandoned.

These questions of domicile are matters of great difficulty, and some of the cases are not easy to reconcile so that it is with considerable diffidence that, after anxious consideration, I feel myself constrained to take a view differing from that of the learned trial Judge.

The determining factor in his mind would appear to have been petitioner's statement that it is his fixed intention, when he has to retire, to settle "in this country" which, in his, the Judge's opinion, could not be taken as indicating more than a vague intention to settle somewhere in Malaya, or in the Federated Malay States. Unfortunately, the petitioner was not questioned as to what he meant by "this country," but it seems to me doubtful whether, in the absence of any evidence on the point, the expression ought to be construed against him to that extent. When a man uses those words without qualification in such a context it would seem not unreasonable to take him as meaning "the country in which I am now residing," and, if one construes the word "country" strictly, it might, I suppose, be applied more aptly to the State of Selangor which has its own separate ruler, than to the Federated Malay States which have no ruler, or to Malaya which is a very loose term indeed.

The accepted evidence is that, apart from short periods of leave, the whole of the petitioner's life since 1911 has been spent at Bhutan Estate in Selangor, and that all his interests are there, and nowhere in his evidence does he refer to any attraction to or interest in any other State or part of the Peninsula.

I entirely agree with the learned Judge's very clear exposition of the law from which it is apparent that he was fully aware of the principles which should be applied in deciding these very difficult question of domicile. Any statement of intention made by a person seeking divorce must necessarily be viewed with suspicion, but there is nothing to prevent a Court from accepting such evidence if it sees fit to do so. Each case has to be decided upon its own particular facts and must depend upon the impression which the Court forms as to the credibility of the witness and the surrounding circumstances,

tending either to support or to controvert what he states as to his intentions.

In the present case, the learned trial Judge, who had the advantage of seeing the petitioner in the witness-box, accepted his evidence, and, with respect, I think that the whole of the circumstances of the case suggest that he was right in so doing. During the three periods of leave which the petitioner has had since 1919 he has not revisited Ireland, his country of origin, and the reasons which he gives for not having done so appear sound and convincing. The only home which he has is Bhutan Estate where he lives in a house which he built himself twenty-four years ago. He has no savings upon which to retire, and owes a substantial sum of money to the Company which employs him. All his friends are in that district, and he has no home ties elsewhere. Everything points to the genuineness of his declared intention to settle in this country and to his having formed that intention long before he commenced these proceedings for divorce.

The only point upon which I differ from the learned trial Judge is as to the meaning which should be attributed to the words "the country." If the petitioner does not settle here it would seem reasonable to expect him to settle in the district where his friends and interests are, and for that reason and for the other reasons which I have already indicated, I feel that, in the absence or argument to the contrary, this country should be taken to mean Selangor.

If I am correct in this view, it would seem to follow from the other findings of the learned Judge that the petitioner has sufficiently answered the test to be applied in these cases which was shortly stated by the Earl of Halsbury L. C. in his judgment in *Winans & Anor. v. Attorney General*, (1904) A.C. 287, 288 as follows:—

"Now the law is plain, that where a domicile of origin is proved it lies upon the person who asserts a change of domicile to establish it, and it is necessary to prove that the person who is alleged to have changed his domicile has a fixed and determined purpose to make the place of his new domicile his permanent home."

In my opinion, the petitioner's evidence, supported as it is by the surrounding circumstances and the probabilities, does establish that he has formed the intention to make Selangor his permanent home.

In conclusion, there is one passage in the judgment of the learned trial Judge to which I should like to refer. It deals with the value to be attached to statements as to intention.

The learned trial Judge referred to the case of *Bryce v. Bryce*, (1933) P. 83, 85 where Lord Merivale observed that he had considered in the light of the authorities what weight should be attached to evidence of declarations of intention and quoted the words used by Dr. Lushington in delivering the judgment of the Privy Council in *Hodgson v. Beauchesne*, (1858) 12 Moo. P.C.C. 285 viz:—

“Such evidence though admissible has been considered by many authorities as the lowest species of evidence.”

It seems to me that that passage standing alone out of its context may be misleading. The learned Doctor is there dealing with declarations alleged to have been made to a witness by a deceased person as to his intention to live in a certain place and not to evidence given on oath by a living person as to his own present intention, as in the present case. Earlier in his judgment he observed that to entitle such declarations by a deceased person to a witness who deposes to them to any weight, the Court must be satisfied not only of the veracity of the witnesses who depose to such declarations but of the accuracy of their memory and that the declarations contain a real expression of the intention of the deceased.

It is obvious that very different considerations must apply to the declarations by living persons made on oath and upon which they are cross-examined.

I would allow this appeal and send the case back for the hearing to be proceeded with.

HOWES, J.—I have had the advantage of reading the judgment of the learned Chief Justice, in which I concur, but would add these observations.

Under Section 3 (i) (b) of the Divorce Enactment, 1928, the Court has jurisdiction to make decrees of dissolution of marriage, only “where the domicile of the husband at the time when the petition is presented is in one of the Federated Malay States.”

Apart from this statutory provision, “according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage.” *Le Mesurier v. Le Mesurier*, (1895) A.C. 517, 540.

In the present case, the question of domicile was not raised by the respondent or co-respondent (neither of whom opposed the petition) but the attention of the learned trial Judge was directed to it by counsel for the petitioner.

In paragraph 1 of the petition, the petitioner stated “that the domicile of your petitioner and

of his wife the said Irma O'Hara Hickaon is within the State of Selangor.”

The parties were married at Singapore on 25th October, 1922. Since counsel for the petitioner raised the question of domicile, the learned trial Judge was obliged to consider it; as he was entitled to do, whether pleaded or not.

The petitioner, who was born in Ireland but has lived in Selangor since 1911, has stated in evidence that he was last there in 1919, when owing to prevailing conditions, he definitely decided that was his last visit to Ireland. He has never returned to Ireland since. He hopes to stay on Bhutan Estate of which he is manager, until he has to retire, and then he proposes “to settle in this country.” He says “That is my fixed intention and has been since 1919.”

The question is, has the petitioner changed his domicile of origin and acquired a domicile of choice?

Any person not under disability may, at any time acquire a new domicile by residing in another country with the intention of continuing to reside there for an indefinite time: to constitute an *animus manendi*, a settled purpose is necessary of making the principal or sole permanent home in the country of residence; accompanied by acts showing that it was more than a passing intention. The principle was stated in *Stanley v. Bernes*, 3 Hagg Ecc. 373, 437, quoted by Lord Hanworth, M. R. in *Boldrini v. Boldrini and Martini*, (1932) P. 9, 13.

“As a criterion, therefore, to ascertain domicile another principle is laid down by the authorities quoted as well as by practice,—it depends upon the intention, upon the *quo animo*—that is the true basis and foundation of domicile; it must be a residence *sine animo revertendi*, in order to change the *domicilium originis*: a temporary residence for the purposes of health, or travel, or business has not the effect: it must be a fixed and permanent residence, abandoning finally and for ever the domicile of origin; yet liable still to a subsequent change of intention.”

In the present case what had to be shown was that when the petitioner presented his petition he was residing in the State of Selangor with the fixed intention of making Selangor his home.

It must be remembered that the petitioner is by profession a planter, who has been in Selangor since 1911. Unlike Colonial Civil Servants, or employees in Banks, commerce, &c. there is no probability of his duties taking him elsewhere. The circumstances of his case,

therefore, strongly support his declared intention of remaining in Selangor permanently.

In his judgment, the learned trial Judge stated "I thought the petitioner a candid witness and I am prepared to accept what he says."

From the petitioner's evidence I think it was clear that he has abandoned his domicile of origin after his last visit to Ireland in 1919.

To every adult person the law ascribes a domicile; and if he abandons his domicile of origin, he must acquire another. As soon as he forms the intention to make residence in a new country permanent; the acquisition of a domicile is complete.

The remarks of the Judge Ordinary in his judgment in *Wilson v. Wilson*, L. R. (1872) 2 P. & D. 435, 447 seem to me very appropriate to the present case.

"I think the Court in every case must look at the species of evidence it would expect to obtain consistently with the circumstances of the man; and looking at the circumstances of this petitioner, the Court could not expect to find him buying a home or land, or hiring a house on a long lease,

or taking any of these steps which in other cases have been held to constitute strong evidence as to change of domicile. Change of domicile is to be inferred, as it seems to me, from the man's own oath, coupled with the circumstances that there is not sufficient evidence to induce the Court to disbelieve it."

In my view, the learned trial Judge was concerned with what was then the present intention of the petitioner, and should not have taken into account what may happen in the future. From the evidence, it is clearly the intention of the petitioner to remain in Selangor for an indefinite period. Unlike other professions that of planting has no age limit for retirement, and it is quite possible that the petitioner may "die in harness."

I therefore respectfully agree with the learned Chief Justice that a domicile of choice has been sufficiently proved by the petitioner, and that the appeal should be allowed. The petition to be sent back for hearing on the facts of the case.

Appeal allowed.